

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY ✓  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

ROBERT SHERMAN WILSON,

Petitioner,

vs

STATE OF WASHINGTON,

Respondent.

NO. 45059-3

COURT OF APPEALS DIVISION II

PERSONAL RESTRAINT PETITION

A. STATUS OF PETITIONER:

ROBERT SHERMAN WILSON was convicted in Pierce County Superior Court Cause No. 09-1-00181-4 of the crimes of Robbery in the First Degree, Unlawful Possession of a Firearm in the First Degree (2 counts), Unlawful Possession of a Stolen Vehicle, Attempting to Elude a Pursuing Police Vehicle (2 counts), Unlawful Possession of a Controlled Substance and Obstruction of a Law Enforcement Officer. His direct appeal was denied and the mandate issued on June 22, 2012. Court of Appeals Division II No. 40179-7.

Mr. Wilson is serving a sentence of 200 months in the Department of Corrections.

B. GROUNDS FOR RELIEF:

Mr. Wilson was convicted of committing eight felonies: first degree robbery with a firearm enhancement for a robbery at the Java 2 Go espresso stand on December 15, 2008 (Count 1); first degree unlawful possession of a firearm on December 15, 2008, and November 18, 2008, and November 18, 2009 (Counts 2 and 6); unlawful possession of a stolen vehicle on January 2, 2009

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1 (Count 3); two counts of attempting to elude a pursuing police vehicle on January 2, 2009, and  
2 November 18, 2008 (Counts 4 and 5); unlawful possession of a controlled substance of a  
3 controlled substance on November 18, 2008 (Count 7): and obstructing a law enforcement officer  
4 on November 18, 2008 (Count 8).

5 Mr. Wilson has always maintained his innocence to Counts 1 and 2, the robbery of the  
6 Java 2 Go espresso stand. He does not deny his guilt to the remainder of the charges. See  
7 Declaration of Robert Wilson.<sup>1</sup>

8  
9 Mr. Wilson, as argued herein, was convicted of the robbery of the Java2 Go espresso based  
10 on misidentification evidence. Subsequent to trial, he learned that another individual who  
11 confessed to the crime and also matches the description of the robber. He seeks relief on these  
12 grounds.

13 Subsequent to Mr. Wilson's conviction, Philip Chase reported a conversation<sup>2</sup> that he had  
14 with Patrick Lamp, a Department of Corrections inmate in approximately February 2010. Lamp  
15 approached Chase in the dining area and started a conversation with him. During that  
16 conversation Lamp stated that Mr. Wilson had been convicted of and was serving time for a  
17 robbery that Lamp had committed. Chase stated that Lamp specifically referred to the Java 2 Go  
18 robbery in Graham, Washington. Lamp ended the conversation and left.

19 Chase provided a physical description of Lamp as follows:

- 20
- 21 • About 6 feet tall
  - 22 • Late 20's
  - 23 • He has numerous tattoos around the area of his neck
  - 24 • He has tattoos on his head
  - 25 • He has tattoos on his eyelids showing the words "Game" and "Over"
  - There is a tear drop tattoo on his cheek

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<sup>1</sup> Appendix A.

<sup>2</sup> Appendix B.

1 Further, prior to being sentenced and going to Shelton, Chase was housed in a section of  
2 the Pierce County Jail known as the "God Pod." During that time he became acquainted with an  
3 individual named "Ricki" Walsh. They discussed the Java 2 Go robbery. Walsh stated that he  
4 recognized Patrick Lamp as the perpetrator from photos of the robbery of Crime Stoppers. In the  
5 photos Patrick Lamp wore a distinctive leather jacket that he had stolen from Walsh.  
6

7 Chase's statements is corroborated by the following documents:

- 8 • **PIERCE COUNTY SUPERIOR COURT CASE DOCUMENTS FOR**  
9 **PHILLIP CHARLES DIETZMAN CHASE IN PIERCE COUNTY**  
10 **SUPERIOR COURT 09-1-00030-3<sup>3</sup>**
  - 11 • Pierce County Court Criminal Case 09-1-00030-3 LINX print-out case history
  - 12 • Pierce County Superior Court Cause 09-1-00030-3 Order Establishing
  - 13 Conditions of Release dated January 5, 2009
  - 14 • Pierce County Superior Court Cause 09-1-0030-3 Judgment and Sentence and
  - 15 Warrant of Commitment dated January 12, 2010 sentencing Mr. Chase to 47.5
  - 16 months in the Department of Corrections
  - 17 • DEPARTMENT OF CORRECTIONS DOCUMENTS FOR PHILLIP
  - 18 CHARLES DIETZMAN CHASE SHOWING
- 19 • **PIERCE COUNTY SUPERIOR COURT CASE DOCUMENTS FOR**  
20 **RICHARD JOHN WALSH IN PIERCE COUNTY SUPERIOR COURT**  
21 **09-1-00856-8<sup>4</sup>**
  - 22 • Pierce County Superior Court Cause 09-1-00856-8 LINX print-out case history
  - 23 • Pierce County Superior Court Cause 09-1-00856-8 Memorandum of Journal
  - 24 Entry and Order Establishing Conditions of Release dated February 19, 2009
  - 25 • Pierce County Superior Court Cause 09-1-00856-8 Judgment and Sentence and
  - Warrant of Commitment dated May 20, 2009 sentencing Mr. Walsh to 90 days
  - in the Pierce County Jail

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25 <sup>3</sup> APPENDIX C

<sup>4</sup> APPENDIX D  
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1 **CRIMINAL CASE DOCUMENTS FOR PATRICK DWAYNE LAMP**

2 *NOTE: Lamp has two robbery convictions for which the following documents are provided herein.*  
3 *Both documents address charges, guilty pleas to, and sentences for robberies of espresso stands in*  
4 *Pierce County, one on November 17, 2008, and the other on April 3, 2009. [MR. WILSON WAS*  
5 *CONVICTED OF ROBBING THE JAVA 2 GO ESPRESSO STAND ON DECEMBER 15, 2008 –*  
6 *A DATE WHEN LAMP WAS OUT-OF-CUSTODY]*

7 • **PIERCE COUNTY SUPERIOR COURT CASE DOCUMENTS FOR**  
8 **PATRICK DWAYNE LAMP IN PIERCE COUNTY SUPERIOR**  
9 **COURT 09-1-00780-4<sup>5</sup>**

- 10 • Pierce County Superior Court Cause 09-1-00780-4 LINX print-out case history
- 11 • Pierce County Superior Court Cause 09-1-00780-4 Information and
- 12 Declaration for Determination of Probable Cause dated February 13, 2009
- 13 • Pierce County Superior Court Cause 09-1-00780-4 Order Establishing
- 14 Conditions of Release dated February 13, 2009
- 15 • Pierce County Superior Court Cause 09-1-00780-4: Statement of Defendant on
- 16 Plea of Guilty, acknowledging in in paragraph 4(b) that Lamp was charged
- 17 with robbery from the Turtle Bay Espresso Stand in Pierce County on
- 18 November 17, 2008. Plea entered on January 27, 2010.
- 19 • Pierce County Superior Court Cause 09-1-00780-4 Judgment and Sentence and
- 20 Warrant of Commitment dated January 27, 2010 sentencing Mr. Lamp to 171
- 21 months in the Department of Corrections

22 • **PIERCE COUNTY SUPERIOR COURT CASE DOCUMENTS FOR**  
23 **PATRICK DWAYNE LAMP IN PIERCE COUNTY SUPERIOR**  
24 **COURT 09-1-00134-2<sup>6</sup>**

- 25 • Pierce County Superior Court Cause 09-1-00134-2 LINX print-out case history
- Pierce County Superior Court Cause 09-1-00134-2 Information and
- Declaration for Determination of Probable Cause dated January 8, 2010.
- Pierce County Superior Court Cause 09-1-00134-2 Order Establishing
- Conditions of Release dated January 14, 2010
- Pierce County Superior Court Cause 09-1-00134-2 Stipulation on Prior Record
- and Offender Score signed by Lamp on January 27, 2010
- Pierce County Superior Court Cause 09-1-00134-2: Statement of Defendant on
- Plea of Guilty, acknowledging in in paragraph 4(b) that Lamp was charged
- with robbery from the Java Girls Espresso Stand in Pierce County on January
- 3, 2009, signed by Lamp on January 27, 2010.
- Pierce County Superior Court Cause 09-1-00134-2 Judgment and Sentence and
- Warrant of Commitment dated January 27, 2010 sentencing Mr. Lamp to 171
- months in the Department of Corrections.

25 <sup>5</sup> APPENDIX E

<sup>6</sup> APPENDIX F  
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1 Additional investigation performed by private investigator Patrick Pitt, retired from years  
2 in British police work, including Scotland Yard, Interpol, and other police entities, established  
3 that Patrick Lamp's physical appearance is very similar, indeed virtually identical, to the  
4 individual who robbed the Java 2 Go on December 5, 2009.

5 In contrast, Wilson's appearance is different from that in the Crime Stopper's Bulletin and  
6 in the security video capturing the robbery at the Java 2 Go. (See Declaration of Patrick A. Pitt.)

7 Patrick Pitt's attached declaration and appendices provide a detailed explication on these  
8 points. In addition, it must be noted that the side view of the individual depicted on the Crime  
9 Stoppers Bulletin clearly has what appears to dark substance, consistent with tattooing, at the  
10 outside of his eye. This, of course, is consistent, with Patrick Lamp's tattoos on his eyelids.

11 In this personal restraint petition, Mr. Wilson easily meets his burden to establish by a  
12 preponderance of the evidence that he has newly discovered evidence that would change the result  
13 at trial. At a minimum he is entitled to a reference hearing before the trial court to determine  
14 whether he is entitled to relief.

15  
16 C. LAW AND ARGUMENT:

17 I. THIS COURT SHOULD GRANT THIS PERSONAL RESTRAINT PETITION  
18 AND REMAND THIS CASE TO SUPERIOR COURT FOR A REFERENCE  
19 HEARING SO THAT MR. WILSON CAN ESTABLISH THAT COMPETENT  
20 NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT ANOTHER  
21 INDIVIDUAL CONFESSED TO THE ROBBERY OF THE JAVA 2 GO ESPRESSO  
22 STAND ROBBERY IN FEBRUARY, 2010 AND THUS MR. WILSON'S  
23 CONVICTIONS FOR THAT ROBBERY SHOULD BE DISMISSED.

1 The appellate court will grant relief to a petitioner if the petitioner is under an unlawful  
2 restraint. RAP 16.4(a)<sup>7</sup>. RAP 16.4(b), in pertinent part, provides that a petitioner is under  
3 restraint if he is confined as Mr. Wilson is for 200 months.

4 Whether a challenge is based on constitutional or nonconstitutional error, a petitioner  
5 must support a PRP with facts or evidence upon which the claims of unlawful restraint are  
6 based and not rely solely upon conclusory allegations. *In re the Personal Restraint Petition of*  
7 *Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990). The evidence presented must consist of  
8 "more than speculation, conjecture, or inadmissible hearsay." *In re Pers. Restraint of Rice*, 118  
9 Wn.2d 876, 886, 828 P.2d 1086 (1992).  
10  
11  
12

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13 <sup>7</sup> Rule 16.4. Personal restraint petition -- Grounds for remedy

14 (a) *Generally*. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the  
15 petitioner is under a "restraint" as defined in section (b) and the petitioner's restraint is unlawful for one or more of the reasons  
16 defined in section (c).

17 (b) *Restraint*. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or  
18 criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under  
19 some other disability resulting from a judgment or sentence in a criminal case.

20 (c) *Unlawful nature of restraint*. The restraint must be unlawful for one or more of the following reasons:

21 (1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the  
22 subject matter; or

23 (2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted  
24 by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution  
25 or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation  
of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local  
government; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction,  
sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and  
sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the  
state or local government; or

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the  
Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) *Restrictions*. The appellate court will only grant relief by a personal restraint petition if other remedies which may be  
available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100,  
and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause  
shown.

continuation of fn. 7: HISTORY: Adopted Jan. 28, 1976, effective July 1, 1976; amended, adopted June 21, 1976, effective  
July 2, 1976; amended, adopted June 6, 1991, effective Sept. 1, 1991.

1 To obtain an evidentiary hearing, "the petitioner must demonstrate that he has  
2 competent, admissible evidence to establish" facts that would entitle the petitioner to  
3 relief. *Rice*, 118 Wn.2d at 886. "If the petitioner's evidence is based on knowledge in the  
4 possession of others, he may not simply state what he thinks those others would say, but must  
5 present their affidavits or other corroborative evidence." 118 Wn.2d at 886.

6 RAP 16.4, the appellate court "will grant appropriate relief to a petitioner" if "[m]aterial  
7 facts exist which have not been previously presented and heard, which in the interests of justice  
8 require vacation of the conviction, sentence, of other order entered in a criminal proceeding."  
9 RAP 16.4(a),(c)(3). The RAP 16.4(c)(3) standards apply to a motion for a new trial based upon  
10 newly discovered evidence. *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 453, 21 P.3d 687  
11 (2001) (citing *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994))

12  
13 II. MR. WILSON HAS DEMONSTRATED THAT HE HAS COMPETENT  
14 ADMISSIBLE EVIDENCE THAT ENTITLES HIM TO RELIEF.

15 The petitioner must establish "that the evidence (1) will probably change the result of  
16 the trial; (2) was discovered since the trial; (3) could not have been discovered before the trial  
17 by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or  
18 impeaching. The absence of any one of the five factors in grounds for the denial of a "new"  
19 proceeding. *In re Personal Restraint Petition of Brown*, 143 Wn. 2d, 431, 453, 21 P.3d 387  
20 (2001) (quoting *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981)); see also CrR  
21 7.5(a)(3).

22 Nearly forty years the United State Supreme Court expressed its concern about flawed  
23 eyewitness identifications.

24 "The vagaries of eyewitness identification are well-known;  
25 the annals of criminal law are rife with instances of  
mistaken identification."

1 *United States v. Wade*, 388 U.S. 218, 228 (1967).

2  
3 Misidentification is one of the most common bases for the exoneration of wrongly  
4 convicted defendants. In fact, eyewitness misidentification was a factor in 72% of post-  
5 conviction DNA exoneration cases in the United States, making it the leading cause of these  
6 wrongful convictions. Innocence Project On-line Report 2013, Benjamin Cardozo Law School  
7 of Yeshiva University. The United States Supreme Court recognized the fallibility of  
8 eyewitness identifications years ago and urged caution in the admission thereof. *Manson v.*  
9 *Brathwaite*, 432 U.S. 98, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977).

10 In this case, Mr. Wilson's post-conviction investigation has discovered new evidence,  
11 unavailable at trial, which has the likely probability to change the result at trial. He is entitled  
12 to relief by this personal restraint petition.

13 In the instant case, Mr. Wilson easily satisfies the five factors:

14 (1) *The evidence will probably change the result of the trial.*

15  
16 When considering whether newly discovered evidence will probably change the trial's  
17 outcome, the trial court considers the credibility, significance, and cogency of the proffered  
18 evidence. *State v. Barry*, 25 Wn. App. 751, 758, 611 P.2d 1262 (1980). Significantly the  
19 standard is "probably change," not just possibly change the outcome. *Williams*, 96 Wn.2d at  
20 223. In this case, Mr. Wilson has presented newly discovered evidence that easily meets the  
21 probable standard, that is, statements against penal interest from a defendant who pleaded  
22 guilty to committing two similar espresso stand robberies in the same area during the same  
23 period and which are corroborated by other evidence.

24 [I]n evaluating [the] probative force of newly presented evidence 'the [c]ourt may  
25 consider how the timing of the submission and the likely credibility of the affiants bear on the

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1 probable reliability of that evidence.”” *State v. Riofta*, 166 Wn.2d 358, 372, 209 P.2d 467  
2 (2009) (third alteration in original) (quoting *Schlup v. Delo*, 513 U.S. 298, 332, 115 S. Ct. 851,  
3 130 L. Ed. 2d 808 (1995)).

4 Mr. Wilson’s newly discovered evidence in fact will likely change the trial’s outcome.  
5 That evidence consists of Lamp’s statements to Chase and Walsh that he committed the Java 2  
6 Go espresso stand robbery. The modus operandi of that robbery is similar to that employed in  
7 the other two espresso stand robberies in that area during the relevant period, thus there would  
8 be ER 404(b)<sup>8</sup> evidence. Next, the physical descriptions of the robber match Lamp, not  
9 Wilson. See *Declaration of Patrick Pitt*. The person depicted in the Crime Stoppers Bulletin  
10 appears to have tattoo marking in the corner of the right eye. Lamp is known to have tattoos on  
11 his eyelids. Witness Ricki Walsh recognized Lamp from a Crime Stoppers source that depicted  
12 the suspect wearing a distinctive leather jacket that Lamp had stolen from him. *Declaration of*  
13 *Patrick Pitt*.

15 This newly discovered evidence thus consists of more than statements. There is  
16 corroborative documentary evidence in the form of photographs. These photos, consisting of  
17

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18  
19 RULE ER 404 CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT EXCEPTIONS: OTHER CRIMES

20 (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the  
21 purpose of proving action in conformity therewith on a particular occasion, except:

22 (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the  
23 same;

24 (2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by  
25 the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in  
a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a  
person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of  
motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

1 booking photos, Crime Stoppers bulletin, freeze frames from the security video, etc., strongly  
2 corroborate the witness statements.

3 This evidence likely would change the result at trial.

4 (2) The evidence was discovered since the trial.

5 Suffice it to say that the evidence simply was not available until after the trial. Mr.  
6 Wilson was convicted of the robbery on November 13, 2009. When Mr. Chase was in the  
7 Pierce County Jail "God Pod" with Mr. Walsh from the time period of 2/19/09 – 5/26/09<sup>9</sup> Mr.  
8 Chase learned that Mr. Walsh had recognized Mr. Lamp wearing his coat from the Crime  
9 Stoppers Bulletin. Further in early 2010, after Mr. Wilson's conviction, Mr. Lamp told Mr.  
10 Chase that he had committed robbery for which Mr. Wilson was serving time. Of course, once  
11 this new evidence was learned, Mr. Wilson's counsel discovered corroborative material for  
12 those statements.  
13

14 Mr. Lamp's statements are the newly discovered evidence. The corroborating evidence  
15 supports the credibility thereof and adds their persuasive force.

16 (3) The evidence could not have been discovered before the trial by the exercise of due  
17 diligence.

18 Mr. Wilson was charged with one count of first degree robbery for the Java 2 Go  
19 robbery. In the course of trial preparation, his counsel through the exercise of due diligence  
20 would not have been able to foretell Mr. Lamp's confessions to the crime. Further, lacking  
21 knowledge of the confessions, trial counsel could not effectively challenge the photographs of  
22  
23  
24

25 <sup>9</sup> Mr. Walsh was in custody in the Pierce County Jail from approximately 2/19/09-5/26/09. Mr. Chase was in  
custody in the Pierce County Jail from approximately 1/5/09 – 1/20/2010.

1 the alleged perpetrator admitted at trial. However, as is readily apparent, Mr. Lamp's physical  
2 appearance and clothing very closely match the individual depicted in all of the photographs.

3 (4) The evidence is material.

4 Evidence is material and, thus, meets the fourth criteria for a new trial if it strongly  
5 indicates that the defendant did not commit the crime. *State v. Gassmen*, 160 Wn.App. 600,  
6 611, 248 P.3d 155 (2011) citing *State v. Scott*, 150 Wn. App. 281, 297, 207 P.3d 495 (2009).

7 In this case Mr. Wilson has steadfastly denied committing the robbery. Certainly many  
8 defendants deny committing the crimes with which they are charged. However, very few cases  
9 subsequent to trial uncover (1) a perpetrator who has admitted to at least two individuals that he  
10 committed the robbery at issue; (2) a perpetrator who was committing similar crimes in the  
11 same area at the relevant time; (3) a perpetrator whose known physical attributes match the  
12 individual depicted in the Crime Stoppers bulletin; (4) a perpetrator whose known physical  
13 attributes are similar to those in the admittedly grainy photos from the security video from the  
14 espresso stand.  
15

16 Mr. Wilson submits that the espresso stand employee's identification of him from a  
17 photo montage diminishes in force because there is no evidence that Mr. Lamp was included on  
18 that photo montage.

19 Similarly, because trial counsel did not make a motion for disclosure of the confidential  
20 informant's (CI) identity, it is impossible to know why the CI was in the police car, whether the  
21 CI knew Lamp and his activities, and wanted to protect him, and/or simply made a wild and  
22 uninformed guess to appear to be useful to police.  
23

24 Mr. Wilson's material evidence strongly indicates that he did not commit the crime.

25 (5) The evidence offered is not cumulative or impeaching.

1 The newly discovered evidence that Mr. Wilson exonerates him. There was no such  
2 evidence presented at his trial.

3 This evidence of exoneration is new, never presented to any fact finder, and therefore  
4 not cumulative.

5 Further, evidence of Mr. Lamp's confessions, admissible as statements against penal  
6 interest. ER 804(b)(3)<sup>10</sup> provides that hearsay statements against penal interest are admissible  
7 if (1) the declarant is unavailable to testify, (2) the statements so far tend to expose the  
8 declarant to criminal liability that a reasonable person in the same position would not have  
9

10 <sup>10</sup> Rule 804. Hearsay exceptions; declarant unavailable:

11 (a) *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant:

12 (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the  
declarant's statement; or

13 (2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do  
so; or

14 (3) Testifies to a lack of memory of the subject matter of the declarant's statement; or

15 (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity;  
or

16 (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in  
the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other  
reasonable means.

17 (6) A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due  
to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or  
testifying.

18 (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

19 (1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a  
deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the  
testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to  
develop the testimony by direct, cross, or redirect examination.

20 (2) *Statement under belief of impending death.* In a trial for homicide or in a civil action or proceeding, a statement made by  
a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the  
declarant believed to be the declarant's impending death.

21 (3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or  
proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the  
declarant against another, that a reasonable person in his position would not have made the statement unless he believed it to be  
true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible  
unless corroborating circumstances clearly indicate the trustworthiness of the statement.

22 (4) *Statement of personal or family history.* (i) A statement concerning the declarant's own birth, adoption, marriage, divorce,  
legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even  
though declarant had no means of acquiring personal knowledge of the matter stated; or (ii) a statement concerning the  
foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or  
was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

23 (5) *Other exceptions.* [Reserved.]

24 HISTORY: Adopted Dec 19, 1978, effective April 2, 1979; amended June 4, 1992, effective Sept. 1, 1992.

1 made the statement unless convinced of its truth, and (3) corroborating circumstances clearly  
2 indicate the statement's trustworthiness. The rule itself expressly requires corroboration only of  
3 statements *exculpating* the accused.

4 Mr. Wilson's newly discovered evidence therefore is not merely cumulative or  
5 impeaching.

6 D. CONCLUSION.

7 Mr. Wilson has demonstrated that he has material evidence that likely would change the  
8 result at trial. This evidence meets the requisite "newly discovered evidence" test. Therefore  
9 this court must grant the requested relief.

10 DATED this 24<sup>th</sup> day of JUNE, 2013.

11  
12   
13 BARBARA COREY, WSBA #11778  
14 Attorney for Petitioner  
15

16 CERTIFICATE OF SERVICE:

17 I declare under penalty of perjury under the laws  
18 Of the State of Washington that the following is a true  
19 and correct: That on this date, I delivered via ABC- Legal  
20 Messenger, a copy of this Document to: Kathleen Proctor,  
21 Pierce County Prosecutor's Office, 930 Tacoma Ave So, Room 946  
22 Tacoma, Washington 98402 and to Robert Sherman Wilson,  
23 DOC# #861542, Stafford Creek Corrections Center  
24 191 Constantine Way, Aberdeen, WA 98520-9504  
25

10.24.13

Date



Kim Redford  
Legal Assistant

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